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### MARRIAGE BROKERAGE CONTRACTS.

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Recent decisions in England and the United States have served to direct attention to the principles on which marriage brokerage contracts are held illegal.

In the recent case of *In re Grobe's Estate*, 102 N. W. Rep. 804, the Supreme Court of Iowa held that a promise, by one desirous of marrying a certain woman, to pay a person if he would give the woman such information concerning the promisor as would tend to induce her to marry him, cannot be enforced. In the court's opinion the following succinct statement of the rule of law appertaining to this subject is offered: "It is well settled that no recovery can be had under a contract for services to be rendered in promoting or bringing about a marriage. Advice and solicitation on the part of a third person with reference to entering into the important relation of marriage are presumed to be given from considerations affecting the interests of the parties themselves, and not for pecuniary reward. It is contrary to public policy to make such advice or solicitation the basis of an agreement to pay money. And the rule is equally applicable to advice or solicitation with reference to carrying out a marriage contract, as it is with reference to the formation of such contract."

The court, in the above case, cites the case of *Morrison v. Rogers*, 115 Cal. 252, 46 Pac. Rep. 1072, 56 Am. St. Rep. 95. In that case the court announces the rule as follows: "The freedom of choice is essential to a happy marriage; and the voluntary selection by each spouse of the person who is to be his companion for life, with all that is implied in the relation of marriage, are as fully prevented by the employment of a person who is governed solely by mercenary motives to induce one of the parties to the agreement of marriage to carry it into effect, if he has once been disposed to abandon it, as to endeavor to bring about such an agreement between parties who do not sustain any relation to each other."

The court also holds in the *Grobe's Estate* Case that it makes no difference whether the

defendant had already entered into the agreement for marriage or not, the court saying on this point: "It does not clearly appear in the present case whether the deceased had already a contract of marriage with the woman in Chicago, which he desired the claimant to assist him in bringing about, or whether he was seeking to induce her to enter into a contract of marriage with him. But it is wholly immaterial what was the prior relation between the parties. It is clearly shown that the services to be rendered by claimant under her agreement with deceased, and for which she desires compensation, were to give to the woman whom deceased wished to marry information concerning him which would tend to induce the woman to enter into such marriage relation; and no argument is necessary to demonstrate that this arrangement was a marriage brokerage contract, pure and simple—such as is deemed by the law to be against public policy, and therefore void."

In line with the latter phase of this decision it is interesting to note that the courts have held that even a promise made after marriage to pay a person for unsolicited services in bringing about the marriage is void. *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Williamson v. Gihon*, 2 Seb. & Lef. 257. Chief Justice Shaw in *Fuller v. Dame*, *supra*, said: "A man might entertain a very sincere opinion that a marriage between a certain gentleman of his acquaintance and a lady of considerable fortune would be highly beneficial and contribute to the happiness of both parties, and he might lawfully propose this to one or both. But any promise of reward made to induce him to do this, or any promise made afterwards in consideration of such service, would be void."

The recent English case is that of *Herman v. Charlesworth*, reported in 49 Sol. J. 377, reversing the judgment of the King's Bench Division in the same case reported in 1 K. B. (1905) 24. It appeared from the facts in this case that the defendant was the proprietor of a paper known as *The Matrimonial Post and Fashionable Marriage Advertiser*, and that the plaintiff entered into an agreement with him whereby, in consideration of his introducing her to gentlemen with a view to marriage, she agreed to pay him £52, of which £47 was to be returned to her after nine months in the event of no marriage or

engagement taking place within that period. She paid the money and signed a further agreement whereby, in the event of her marriage with some gentleman through the influence of the defendant, she agreed to pay him £250 on the date of the marriage. She was introduced to several gentlemen, but no marriage or engagement followed, and she ultimately brought her action to recover back the £52 as money paid under an illegal agreement. The King's Bench Division gave judgment for the defendant, holding that to constitute an illegal marriage brokerage contract it must be a bargain for reward to procure for another as husband or wife a certain specified person; that there was here no undertaking to procure for the plaintiff any particular person as her husband, and that a contract for reward to introduce another to persons of the opposite sex with a view to matrimony was not illegal.

The Court of Appeals denied the efficacy of this argument, and reversed the decision. In commenting on this case the *Solicitor's Journal* says: "Having read some of the cases relating to marriage brokerage contracts, which are not among the dullest in the law reports, we could find nothing to support the distinction taken by the court, and we observed in a previous issue (49 *Solicitor's Journal*, 64) that an agreement to procure a husband or wife, not being a named or specified person, appeared to us to be open to the objections which are the grounds for avoiding a contract to procure for another in marriage as husband or wife a certain specified person, and that such an agreement was, in our opinion, not a fit subject for ordinary litigation. We think we may venture to say that the decision of the Court of Appeal is substantially in accordance with this view. The Master of the Rolls examines the cases on marriage brokerage contracts with much care (including one in which the bill in chancery was procured from the Record Office) and comes to the conclusion that the mischief which is the foundation of the illegality exists equally in the case of a contract to procure a marriage generally. We think that the judgment will be read with interest not only in this country, but in all English-speaking communities. We should add that the learned judge examines the further question whether it was too late for the plaintiff to avoid the contract with much clearness and cogency of reasoning."

## NOTES OF IMPORTANT DECISIONS.

**MASTER AND SERVANT — LIABILITY OF MASTER FOR THEFT BY SERVANT.**—The recent English case *Cheshire v. Bailey* (1905). 1 K. B. 237 is one of those cases which must puzzle the mind of the "man in the street," if he ever should pry into the mysteries of the law. In this case the plaintiff, a wholesale silversmith, hired from defendant a carriage and coachman for the purpose of conveying one of plaintiff's travelers about London with samples of the plaintiff's wares to be shown to customers. It was known to the defendant that these samples would sometimes have to be left in charge of the coachman while the traveler left the carriage. On one of such occasions the coachman during the absence of the traveler drove the carriage to a place where, in pursuance of an arrangement with confederates, the samples were stolen. The plaintiff claimed to recover their value from the defendant. Walton, J., who tried the case, thought it was governed by the decision of the Court of Appeal in *Abraham v. Bullock*, 86 L. T. 796, where the carriage owner had been held liable to make good a loss occasioned to the hirer, by reason of the coachman having, during the hirer's absence, left the carriage unguarded, in consequence of which it had been driven off by some unknown person, and the property of the hirer stolen therefrom; but the Court of Appeal (Collins, M. R., and Stirling, and Mathew, L. JJ.) held that he was wrong in that conclusion, and that though the master may be liable for damages occasioned by his servant's negligence, he is not liable for damages occasioned by his criminal act, because, in committing such an act, the servant is not acting within the scope or course of his employment; while therefore the carriage owner is responsible if a third person steal the hirer's property from the carriage owing to the driver's negligence, he is not responsible if the driver himself steal it. "As *Abraham v. Bullock* never got into the regular reports," says the *Canada Law Journal* in commenting on this decision, "perhaps the editor may have had his doubts, and the case having now been through the process of being 'distinguished' may shortly arrive at the latter stage of being 'doubted' as a preliminary to being finally overruled: for one would not be surprised to find that the same reasons which have exonerated the owner of a carriage from liability for the driver's dishonesty, may ultimately be found to apply equally to losses of property occasioned by the driver's negligence unless it be in the very act of driving. If a person wishes to convey valuable property in a hired carriage it would seem not unreasonable to say that the hirer and not the carriage owner, should provide for the protection of the property from theft, whether by the driver, or any third person, and that the letting of a carriage does not in any case constitute the carriage owner the insurer of the goods to be conveyed in it, except it be expressly so agreed."

### SOME CHANGES EFFECTED BY THE NEGOTIABLE INSTRUMENTS LAW IN MISSOURI.

In order to correctly interpret the various sections of the Negotiable Instruments Law, it is essential to accurately understand its history and the general literature, principally in the form of magazine articles, that has already grown up around it. It is not, however, the purpose of this paper, nor would it be possible in so limited a space, to discuss these general features of the act. It is intended merely to point out in as brief a form as possible some of the changes which the Negotiable Instruments Law has effected in the Missouri law relating to commercial paper.

It may not be out of place, however, to make a few general statements in regard to the act.

The committee on uniform state laws of the American Bar Association was appointed in 1889. The resolution, as a result of which the committee was appointed, recommended for the consideration of the committee the subjects of marriage and divorce, descent and distribution of property, acknowledgment of deeds, and the execution and probate of wills. In 1891 the committee reported that changes in the law in reference to these subjects would meet with great difficulty and would be more likely to be adopted, if at all, after the general advantages of uniformity in commercial matters had been demonstrated by experiment. In 1895 the committee on commercial law was requested to procure a draft of a bill relating to commercial paper, and based on the English Statute on that subject. Accordingly, the committee on commercial law appointed a sub-committee of three to carry out the instructions contained in the resolution. In September, 1895, this sub-committee employed John J. Crawford, of the New York bar, to prepare a draft of a bill. Upon its completion in December of that year, it was revised by the sub-committee, and annotated for the convenience of study.<sup>1</sup> At the conference of the committee on uniform state laws, in 1896, the draft was examined, section by section, and after certain amendments, was adopted. In the following year it was approved by the committee on uniform laws of

the American Bankers' Association. Then commenced an active campaign for the adoption of the act in the various states. Prior to the adoption of the act by the Missouri legislature, it had become law in twenty-five states, one district and one territory.<sup>2</sup>

In noting the effect of the Negotiable Instruments Law upon Missouri law, the sections of the act will be taken up in their numerical order, and those sections will be briefly considered which either settle questions upon which the law in this state has been in doubt, or actually change existing law. Upon questions where there are no decisions by our appellate courts, Missouri law will be assumed to be in line with the weight of authority at common law.

1. By subsection 4, of section 2, of the act, it is provided that the sum payable is a sum certain within the meaning of the act, although it is to be paid "with exchange, whether at a fixed rate, or at the current rate."

This subsection, and the one following, are among those provisions of the new law aimed at settling disputed points. The Missouri courts, following the weight of authority in this country, held such a provision destructive of negotiability.<sup>3</sup> This is a change of some importance.

2. A change of the same character is effected by subsection 5, of section 2, which provides that the sum payable is a sum certain, although it is to be paid "with costs of collection or an attorney's fee in case payment shall not be made at maturity."

<sup>2</sup> The following list was supplied to the writer by Mr. Amasa M. Eaton. Connecticut Laws of 1897, ch. 74; Colorado Laws of 1897, ch. 64; New York Laws of 1897, ch. 612; New York Laws of 1898, ch. 336; Florida Laws of 1897, ch. 4524; Massachusetts Laws of 1898, ch. 533; Massachusetts Laws of 1899, ch. 130; Maryland Laws of 1898, ch. 119; Virginia Laws of 1897-98, ch. 866; Rhode Island Laws of 1899, ch. 674; Tennessee Laws of 1899, ch. 674; North Carolina Laws of 1899, ch. 733; Wisconsin Laws of 1899, ch. 356; North Dakota Laws of 1899; Utah Laws of 1899, ch. 149; Oregon Laws of 1899, Sen. Bill 27; Washington Laws of 1899, ch. 149; District of Columbia Laws of 1899, U. S. Stat.; Arizona R. S. 1901; Pennsylvania Laws of 1901, ch. 162; Ohio Laws of 1902, Sen. Bill 10; Iowa Laws of 1902, ch. 130; New Jersey Laws of 1902, ch. 184; Montana Laws of 1903, ch. 121; Idaho Laws of 1903, Sen. Bill 86; Kentucky, ch. 102, Acts 1904; Louisiana, Acts 64 of 1904; Wyoming; Kansas.

<sup>3</sup> *Fitzharris v. Leggatt*, 10 App. 527; *Chandler v. Calvert*, 87 App. 367.

<sup>1</sup> Crawford's Annotated Negotiable Instruments Law.

It will not be necessary to cite the numerous and familiar decisions of our courts, holding an instrument with such a provision to be non-negotiable. The courts have gone further than this, and have held that an instrument containing such a provision could not even be a non-negotiable note.<sup>4</sup> The Negotiable Instruments Law was not intended to apply to non-negotiable paper, but in some cases it must necessarily do so. Of course, a negotiable note must of necessity be a note. As will be shown later, the converse of this proposition is not true, even under the terms of the Negotiable Instruments Law.

3. Section 5, of the Act provides that: "An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable."

The section then states four kinds of collateral agreements which do not impair negotiability.

There has been some doubt in the past as to what collateral agreements impair the negotiable character of an instrument. Some courts have held a very strict doctrine. Others have held that the mere insertion of an agreement which the law would imply would not destroy negotiability. The *dicta* in this state would indicate that Missouri is lined up with the more liberal jurisdictions. If this be true, the law must be considered changed by section 5. At any rate, a doubtful question is settled.

4. An important change is introduced into our law by subsection 2, of section 6, which provides that the validity and negotiable character of an instrument are not affected by the fact that it "does not specify the value given, or that any value has been given therefor."

Checks and bills of exchange not containing any statement that value had been given therefor have always been held negotiable in this state, but promissory notes have been held in numerous decisions to derive their negotiability solely from our statute, enacted at an early day to settle the dispute which had existed in England between the merchants and Lord Holt. This statute has been brought through each revision and now finds

expression in section 457 of the Revised Statutes of 1899. By its terms, a note to be negotiable must be expressed to be for value received. This section is now supplanted by the Negotiable Instruments Law. But section 449, of the Revised Statutes of 1899, is still in full force and effect, and, in order to recover the statutory damages of 4 per cent, 10 per cent, and 20 per cent, upon an instrument protested for non-acceptance or non-payment, the instrument, whether it be a note, check or bill of exchange, must be expressed to be "for value received." Section 449, of the revised statutes of 1899, is limited in its terms to bills of exchange, but the holder of a note has been held entitled to damages under section 449, by virtue of section 457, which provides that negotiable notes shall have the same effect and be negotiable in like manner as inland bills of exchange. On this point these sections of the Revised Statutes, and the decisions thereunder, are still in full force and effect.

5. The decisions in Missouri, in accord with the weight of authority, have held that an instrument bearing a seal could not be negotiable.<sup>5</sup> These decisions are nullified by subsection 4 of section 6 of the act.

6. Subsection 5 of section 6 of the act provides that the validity and negotiable character of an instrument are not affected by the fact that it "designates a particular kind of current money in which payment is to be made."

There have been two Missouri cases involving this point.<sup>6</sup> In the Farwell case the Supreme Court held that a note payable "in currency" was not negotiable. In the Chandler case the Court of Appeals held that a note payable in "New York exchange" was non-negotiable. The latter decision would be clearly correct even under the Negotiable Instruments Law, because "New York exchange" is not a "particular kind of current money." But the remarks of the court and the cases cited would indicate an opinion as to the broad proposition inconsistent with this section of the Negotiable Instruments Law. From the manner in which Farwell v. Ken-

<sup>4</sup> Bank v. Jacobs, 73 Mo. 35; Bank v. Gay, 71 Mo. 627; Bank v. Marlow, 71 Mo. 618. In these cases it was held that the pleadings must conform to the rules applicable to ordinary contracts.

<sup>5</sup> Brown v. Lockhart, 1 Mo. 409; Benoist v. Carondelet, 8 Mo. 250.

<sup>6</sup> Farwell v. Kennett, 7 Mo. 505 (1842); Chandler v. Calvert, 87 App. 368, 373 (1900).

nett is cited, the court seems to indicate that the same decision would be reached to-day upon an instrument expressed in similar terms. If this be true, the law is changed by the new act. But it is submitted that the decision in *Farwell v. Kennett* turned solely upon the point that "currency" in 1842 did not mean what it does now, and was not "current money." The principle of law recognized and expressed in *Farwell v. Kennett* would make an instrument issued to-day and "payable in currency" negotiable. This section merely codifies the true common law principle, expressed in the best considered cases, a principle from which Missouri courts have never departed in any actual decision.

In this connection it may be well to state that, while an instrument payable in property under the act can never be negotiable, such an instrument with the other proper essentials may be a note under section 894, Revised Statutes, 1899. The Negotiable Instruments Law does not affect the rules applying to non-negotiable instruments, unless it does so in the manner explained above. In 1855 there was a statute in this state making instruments "payable in property" negotiable, but it very properly found a grave in the next revision.

7. Subsections 5 and 6, of section 8 of the act provide that an "instrument may be drawn payable to the order of one or some of several payees; or the holder of an office for the time being."

Although there are no decisions on either point in this state, Missouri law may fairly be said to be changed on both points. In *Blanckenhagen v. Blundel*,<sup>7</sup> *Hobroyd, J.*, failed to grasp the mercantile conception of a negotiable instrument, and decided that an instrument payable to one of several payees was not negotiable. The case has been followed and the error incorporated into the common law of this country with practically no dissent.

The same may be said of the case of *Storm v. Sterling*,<sup>8</sup> in which it was held that a note payable "to the secretary for the time being" of a certain society was not negotiable. The small group of cases in this country involving the point have followed

*Storm v. Sterling*. Section 8 of the act corrects these judicial errors.

8. It may fairly be assumed that Missouri law has been in line with the general law in this country to the effect that the negotiation by delivery of an instrument payable to bearer, or indorsed in blank, is not impaired by a special indorsement. This is changed by section 9, subsection 5, of the act, which provides that an instrument is "payable to bearer when the only or last indorsement is an indorsement in blank." There can be little doubt as to the intended effect of this subsection. It is substantially the same as section 3 of the English act. The English law was deliberately altered upon the recommendation of English bankers and merchants. The only possible doubt as to the effect of subsection 5 of section 9 of the Negotiable Instruments Law is created by section 40 of the same act. For an understanding of these two sections taken together, or, rather, for an understanding of the impossibility of understanding them, the reader is referred to the discussion between Dean Ames and Judge Brewster.<sup>9</sup>

9. Section 16 of the act, among other provisions, contains the following:

"But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed."

It would not be possible in so short a space to discuss the decisions in this country, many of them irreconcilable, upon the liability of a party, not guilty of negligence, from whom a negotiable instrument has been stolen, to a *bona fide* holder for value. In the only cases in this state the facts have shown negligence on the part of the true owner of the stolen instrument.<sup>10</sup> A few jurisdictions, in the absence of negligence on the part of the owner, refuse to allow recovery by a holder in due course. The majority of jurisdictions, however, reach a contrary result. A careful examination of the cases of the latter class will demonstrate that these courts hold the true owner liable on the ground that where two innocent parties are injured by the wrongful act of a third party, the active innocent party

<sup>7</sup> 2 B. & A. 417.

<sup>8</sup> 3 E. & B. 382.

<sup>9</sup> See note at end of article.

<sup>10</sup> See *Walters v. Tielkemeyer*, 72 App. 371.

must bear the loss. Therefore, when the instrument has been acquired by force, it may be confidently stated that very few jurisdictions would allow recovery on the part of a subsequent holder in due course. Under the broad terms of section 16, the *bona fide* purchaser for value is protected in every case. The change, on its face, seems a little startling but, on reflection, should commend itself on account of its effect to increase the credit of commercial paper. A similar provision was adopted in Germany, after careful consideration.

10. Section 20 of the act, in reference to the liability of a person signing for or on behalf of a principal, or in a representative capacity, settles a question upon which the law of Missouri, as well as other jurisdictions, has been in some confusion. In this connection should be noted section 42 of the act, in reference to instruments drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation.

11. It has been the established law of this state that a transfer in payment of a pre-existing debt constitutes value. So, if valuable liens are released,<sup>11</sup> or there is an agreement to forbear suit,<sup>12</sup> or for an extension of time.<sup>13</sup> But a transfer as mere collateral for a pre-existing debt does not carry the instrument free of equities.<sup>14</sup>

Section 25 of the act provides as follows:

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time."

This section is poorly expressed, and a conflict has already arisen upon its effect in case of a transfer merely as security for a pre-existing debt. Three cases have taken the position that such a transfer constitutes value under Section 25.<sup>15</sup> Two New York cases have reached the contrary result.<sup>16</sup> In *Sutherland v. Mead*, the court states that ju-

dicial notice will be taken of the fact that the commission was appointed to review and codify existing laws and not to take new rules. If this premise be accurate, the result in that case must be correct, for the New York court could only take judicial notice of their own existing laws. But the premise is clearly erroneous, for under it uniformity, one of the manifest objects of the act, would be impossible where there was a prior conflict. It is impossible to give a full discussion of this question, but the better opinion seems to be with the Virginia and North Carolina cases. If this be true, there is a change of great importance in Missouri law.

12. Section 31 of the act provides as follows: "The indorsement must be written on the instrument itself or upon a paper attached thereto."

At common law, both in England and the United States, it may fairly be said that there was no conflict upon the principle, that an *allonge* could not be used unless there was no room for the signature upon the back of the instrument itself.<sup>17</sup> As section 31 should be read in connection with existing law, our Missouri law would seem to remain unchanged, in spite of the fact that the condition is not expressed in the section.

13. Section 210 of the Revised Statutes of 1899, provides as follows:

"Executors and administrators may assign the notes and bonds, stocks, accounts, and all other evidence of debt of the estate to creditors, legatees and distributees in discharge of an amount of their claims equal to the amount of such bond or note."

It has been decided, under this section, that the negotiability of a note must, contrary to the doctrine prevalent in other jurisdictions, cease with the death of the payee, or holder, except in the one instance expressly provided for in this section.<sup>18</sup> The same result has even been reached, without the aid of section 210, upon our rather exceptional doctrine of the limited powers of a personal representative over the assets of the deceased.<sup>19</sup>

Such an exceptional doctrine restricting the negotiability of an instrument is nowhere

<sup>11</sup> *Fitzgerald v. Barker*, 96 Mo. 661.

<sup>12</sup> *Deere v. Marsden*, 88 Mo. 512.

<sup>13</sup> *Crawford v. Spencer*, 92 Mo. 498.

<sup>14</sup> *Boettger v. Roehling*, 72 App. 257; *Lowen v. Forsee*, 137 Mo. 29.

<sup>15</sup> *Payne v. Zell*, 98 Va. 294; *Brewster v. Shrader*, 26 N. Y. Misc. Rep. 480; *Brooks v. Sullivan*, 129 N. C. 190 (Semble).

<sup>16</sup> *Sutherland v. Mead*, 80 N. Y. App. Div. 103; *Roseman v. Maloney*, 83 N. Y. Supp. 749.

<sup>17</sup> *Bishop v. Chase*, 156 Mo. 158.

<sup>18</sup> *Stagg v. Linnenpelsner*, 59 Mo. 336.

<sup>19</sup> *Stagg v. Greene*, 47 Mo. 500.

recognized in the new act. Section 47, of the act enacts that "an instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise." Reading section 16, *supra*, of the act in connection with section 47, it results that even in a case where the instrument is stolen, or taken by force from the personal representative, a holder in due course can recover thereon.

Upon this question Missouri must now fall in line and march with other jurisdictions.

14. The courts in this state have in the past adhered to the rule (laid down by the English courts and followed by about one-half of the jurisdictions in this country) that one who purchases negotiable paper after maturity is subject only to such equities as attach to the instrument itself.<sup>20</sup> For example, in this state the maker of a note could not set-off against a purchaser after maturity a debt owing from the payee to himself.<sup>21</sup> The same rule has been applied in this state to a purchaser before maturity who is not a holder in due course.

These decisions are completely nullified by section 58 of the act, which provides as follows: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable."

This is a change of great importance.

Section 4488 of the revised statutes of 1899 provides that "in actions on assigned accounts and non-negotiable instruments, the defendant shall be allowed every just set-off or other defense which existed in his favor at the time of his being notified of such assignment."

Reading together section 58 of the act and section 4488 of the Revised Statutes of 1899, it would even seem that the maker should be allowed to set off against any holder, except one in due course, a claim existing in the maker's favor against the holder's prior intermediate indorser. It is true that the decision in *Frowein v. Calvird*, decided by the Kansas City Court of Appeals in 1898, and reported in 75 Mo. App. 567, would seem squarely against such a result. It is submitted,

however, that the result in that case is open to serious question.

15. Sections 63, 64 and 17, subsection 6, define the liabilities of anomalous indorsers.

The decisions in this state seem to have practically settled that a party who signs his name before delivery on the back of a note of which he is not the payee, is held *prima facie* as joint-maker.<sup>22</sup> But it may be shown, as against any one except a holder in due course, that some other obligation was undertaken.<sup>23</sup> But where the instrument is payable to the maker's order, our courts have decided that one signing before delivery is an indorser.<sup>24</sup> One who not being a party signs his name on the back of the instrument after delivery, is a guarantor.<sup>25</sup>

The liability of one signing in any of the above positions is defined by the aforesaid sections of the act to be that of an indorser. Evidence to vary this liability would no longer be in aid of the instrument and could not be used. This is another change of great importance.

The rules applicable in the past in this state to anomalous indorsers having been applied to both negotiable and non-negotiable paper.<sup>26</sup> As pointed out above, the new act affects directly only those rules applicable to negotiable paper. In the absence of judicial legislation, the rules applicable in the past to non-negotiable paper would seem to remain in full force.

16. Section 73 of the act provides that:

"Presentment for payment is made at the proper place \* \* \* 3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment. 4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence."

Judicial utterance in this state has indicated that a demand anywhere upon the maker personally would be sufficient, in cases where

<sup>20</sup> *Gemmell v. Hueber*, 71 App. 408.

<sup>21</sup> *Hunleth v. Leahy*, 146 Mo. 408.

<sup>22</sup> *Rossi v. Schawacker*, 66 App. 67; *Kingman & Co. v. Cornell-Tibbetts Mach. & Buggy Co.*, 150 Mo. 282.

<sup>23</sup> *Howser v. Newman*, 65 App. 367.

<sup>24</sup> *Bank v. Payne*, 111 Mo. 299.

<sup>25</sup> *Burnham v. Gosnell*, 47 App. 637.

<sup>26</sup> *Lewis v. Harvey*, 18 Mo. 74; *Barnett v. Nolte*, 55 App. 184.

the instrument is made payable at no particular place.<sup>27</sup>

It is evident from subsections 3 and 4 of section 73 of the act that presentment in person anywhere is only sufficient where the person to make payment has no usual place of business or residence. The change is technical but merits notice.

17. Section 85 of the act provides that "every negotiable instrument is payable at the time fixed therein without grace." This is an important and salutary change. The provision for days of grace was good in its day but has now become a barnacle hanging on to the common law, making double work in collecting negotiable paper and serving no really good practical purpose. Section 85 also regulates the time of payment of instruments maturing upon Sunday or a holiday, or on Saturday, when that entire day is not a holiday. When the day of maturity falls on Sunday or a holiday, the instrument is payable on the next succeeding business day. This changes section 461 of the revised statutes of 1899 in so far as section 461 requires an instrument falling due on Sunday or a holiday, when the succeeding day is a holiday, to be presented on the day previous. Section 85 provides that instruments falling due on Saturday, when Saturday is a half-holiday, shall be presented for payment on the next succeeding business day, except demand paper, which may at the option of the holder, be presented for payment before twelve o'clock on Saturday when that entire day is not a holiday. Section 146 provides that presentment for acceptance may be made before twelve o'clock on Saturday in such cases. These sections make some slight changes in our law, as may be seen by comparing them with sections 461 and 462 of the Revised Statutes of 1899.

18. Up until 1890 it was the settled law of Missouri that notice of dishonor sent by mail was not sufficient where the person giving notice and the person to receive notice resided in the same place.<sup>28</sup> But in *Stephens v. Gallagher*,<sup>29</sup> in a dictum,

Judge Thompson questioned whether this rule would survive the introduction of the new immediate delivery system. It will not survive the introduction of the Negotiable Instruments Law, for section 103, subsection 3, expressly authorizes notice by mail in such a case.

19. Section 122 of the act provides that the holder may in writing or by delivery of the instrument expressly renounce his rights against any party to the instrument before, at, or after maturity, and thereby discharge the instrument except as against a holder in due course. This doctrine of renunciation is new in Missouri law.

20. The law in this state has always been that an alteration, however slight or immaterial, or however innocently made, would discharge the instrument.<sup>30</sup> And it has been held that no recovery in such a case could be had on the instrument by a *bona fide* purchaser for value.<sup>31</sup>

Section 124 of the act provides:

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers." "But where an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

In *Bank v. Bosserman*,<sup>32</sup> a note was signed by A and payable to B or order. B added these words to the face of the instrument, "hereby intending to charge my separate estate and property." B then indorsed to C, a holder in due course. C was not allowed to recover against A, although the court held that the alteration was clearly immaterial, since A was not a female. Under section 124 the instrument would not have been affected by the immaterial alteration, and even if material C could have recovered according to the original tenor of the instrument. Section 125 specifies what is a material alteration.

21. Section 445 of the Revised Statutes of 1899 provides as follows:

<sup>27</sup> *Simmons v. Belt*, 35 Mo. 461; *Townsend v. Dry Goods Co.*, 85 Mo. 503; *Clough v. Holden*, 115 Mo. 336.

<sup>28</sup> *Bailey v. Bank*, 7 Mo. 467; *Gilchrist v. Donnell*, 53 Mo. 591; *Bank v. Chambers*, 14 App. 156.

<sup>29</sup> 42 App. 254 (1890).

<sup>30</sup> *Bank v. Fricke*, 75 Mo. 178.

<sup>31</sup> *Bank v. Meyers*, 50 App. 161.

<sup>32</sup> 52 App. 269.

"An unconditional promise, in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance in favor of every person to whom such written promise shall have been shown, and who, upon the faith thereof, shall have received the bill for a valuable consideration."

Section 135 of the act is similar in terms except that the words "to whom such written promise shall have been shown and" are omitted.

22. Section 137 of the act provides:

"Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same."

This is similar in terms to section 448 of the Revised Statutes of 1899. Section 137 of the act illustrates well the necessity of understanding the history of the Negotiable Instruments Law. Many of the sections are taken bodily from the English act, and some from state statutes. In such cases, of course, it is important to know the prior judicial interpretations of the sections.

Section 448 of the Revised Statutes of 1899 of this state, and section 137 of the act were both taken from the statutes of New York.<sup>33</sup> Under the New York section it had been held that a holder, to recover, must prove a conversion of the bill.<sup>34</sup> Practically the same result has been reached in this state,<sup>35</sup> and this construction of the section will remain unchanged. In *Hays v. Bank*,<sup>36</sup> the court held that a check was not a bill of exchange within the meaning of the term as used in section 448 of the revised statutes of 1899. In section 185 of the act, it is provided that "except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." As there is nothing in section 138 of the act to exclude a check, the distinction, as laid down in *Hays v. Bank*, must be considered nullified.

23. Section 142 of the act, among other

provisions in reference to a qualified acceptance, contains the following:

"When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto."

At common law it was held, with very slight dissent, that an express assent on the part of the drawer must be shown. This section, which is copied from the English Bill of Exchange Act, settles the point in favor of the holder.

24. Section 154 of the act provides that protest may be made by "1, a notary public; or 2, by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses."

In Missouri it has been doubtful if an effectual protest could be made by any one except a notary, and certainly not unless a notary could not with reasonable diligence be procured.

25. Section 184 of the act contains the following provision:

"A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another \* \* \*"

It is only a fair construction of this section that the entire promise must be in writing, and not implied.

In *Brady v. Chandler*,<sup>37</sup> it was held that the words "Due B one hundred and fifty dollars," constituted a note, the promise being implied. The question of negotiability did not there arise. As there were no words of negotiability, of course the instrument would have been held non-negotiable. But had the words been, "Due B, or order, one hundred and fifty dollars," to be consistent the Missouri courts would have been forced to hold the note negotiable. This is the result in other jurisdictions, adhering to the implied promise doctrine.<sup>38</sup> It may be fairly stated, therefore, that Missouri law is changed upon this point.

Another provision of section 184 is as follows:

<sup>33</sup> 2 Rev. Stat. (6th Ed.) 1161.

<sup>34</sup> *Matteson v. Moulton*, 79 N. Y. 627.

<sup>35</sup> *Dickinson v. Marsh*, 57 App. 566.

<sup>36</sup> 75 App. 211.

<sup>37</sup> 31 Mo. 28, following *Finney v. Shirley*, 7 Mo. 42, and *McGowen v. West*, 7 Mo. 560.

<sup>38</sup> *Huyek v. Meador*, 24 Ark. 192; *Carver v. Hays*, 47 Me. 257. See *Daniel on Neg. Ints.* sec. 33.

"Where a note is drawn to the maker's own order, it is not complete until indorsed by him."

This section settles if it does not change, Missouri law. In the early history of this state a note drawn payable to maker was inchoate and did not become effective until it had been indorsed by the maker. Section 735 Revised Statutes of 1889,<sup>39</sup> provides:

"Such negotiable promissory notes, made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker, and all persons having knowledge of the fact, as if payable to bearer \* \* \*."

In *Lowrie v. Zunkel*,<sup>40</sup> the Kansas City Court of Appeals held that the word "negotiated," as used in section 735, meant negotiation by delivery merely, as well as negotiation by indorsement, thereby changing the common law. At the same term, the supreme court in a dictum stated that section 735 was merely declaratory of the common law.<sup>41</sup> Upon this point the new act will be welcome.

The changes above stated are not meant to be exhaustive and undoubtedly other and further changes will be demonstrated when the new act is put into practical operation. Enough changes have been given, however, to indicate to the bar, and to those interested in commercial affairs, the necessity of a careful study of the Negotiable Instruments Law. Even considered from a purely local standpoint, the act may be said to improve Missouri law. Many unfortunate decisions are corrected, many doubts removed. In a few cases it will be necessary to surrender principles confidently felt to be correct. But even these should be gladly sacrificed upon the altar of uniformity. Upon the history of the Negotiable Instruments Law, the articles collected in the note below<sup>42</sup> will be found both profitable and interesting.

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<sup>39</sup> Sec. 459, R. S. 1889.

<sup>40</sup> 49 App. 153 (1892).

<sup>41</sup> *Bank v. Payne*, 111 Mo. 291, 300 (1892).

<sup>42</sup> "The Negotiable Instruments Law," by James Barr Ames, 14 *Harv. L. Rev.* 241; "A Defense of the Negotiable Instruments Law," by Lyman D. Brewster,

# CRIMINAL LAW—EVIDENCE AT INQUEST AS CONSTITUTING AN ADMISSION.

TUTTLE V. PEOPLE.

*Supreme Court of Colorado, March 6, 1905.*

Where defendants, being suspected of having committed a homicide, before arrest were examined as witnesses at a coroner's inquest, and, without being represented by counsel or warned, they voluntarily testified, though knowing that they were suspected of complicity in the offense under investigation, statements made by them in their testimony so given were inadmissible against them in a subsequent prosecution for the homicide.

Const. art. 2, § 18, providing that no person shall be compelled to testify against himself in a criminal case, does not limit the protection of the individual to criminal prosecution against himself, but precludes the use of evidence given by accused in any investigation which might tend to show that he himself had committed a crime, though the evidence so given did not amount to a confession.

GABBERT, C. J.: Plaintiffs in error were convicted of the murder of Joseph Meenan. The first point we shall consider relates to the admissibility of statements made by the defendants at the coroner's inquest. They were subpoenaed as witnesses to appear before the coroner's jury, then engaged in investigating the cause of the death of deceased and ascertaining the guilty parties, and were duly sworn and testified before that body. At this time the defendants were not under arrest, nor had any information been filed against them, but they were suspected of being guilty of Meenan's murder, and knew that they were suspected. At least, Tuttle knew he was suspected, and from the nature of the questions propounded, they must have known that they were both suspected. Their statements were not

10 *Yale L. Journal*, 84; "The Negotiable Instruments Law, A Word More," by James Barr Ames, 14 *Harv. L. Rev.* 442; "The Negotiable Instruments Law, A Rejoinder to Dean Ames," by Lyman D. Brewster, 15 *Harv. L. Rev.* 26. In 1902, the Harvard Law Review Publishing Association published a pamphlet containing the text of the Negotiable Instruments Law, all the above articles, together with supplemental notes by Dean Ames and Judge Brewster, and a letter, commenting upon the Law, from Mr. Arthur Cohen, Q. C., the eminent English authority upon this branch of the law. Other articles are: "The Negotiable Instruments Law, A Reply to the Criticisms of James Barr Ames," by John Lawrence Farrell, *The Brief of Phi Delta Phi*, Vol. III, No. 2, First Quarter, 1901; "The Negotiable Instruments Law, A Review of the Ames-Brewster Controversy," by Charles L. McKeehan, 41 *Am. L. Reg. N. S.* Nos. 8, 9 and 10; "The Negotiable Instruments Law, Necessary Amendments," by James Barr Ames, 16 *Harv. L. Rev.* 255; "The Negotiable Instruments Law, Its History and Practical Operation," by Amasa M. Eaton, 2 *Mich. L. Rev.* No. 4; "The Negotiable Instruments Law in the Michigan Legislature," by George W. Bates, 37 *Am. L. Rev.* 873; "The Negotiable Instruments Law," by John L. Farrell, 5 *Brief*, 1.

confessions or admissions of guilt, but related principally to their whereabouts and movements at and about the time of the homicide. They made no objection to testifying, were not represented by counsel, and were not warned that their statements might be used against them, or that they were privileged to refuse to testify if they so elected. Their counsel contend that the statements were inadmissible at the trial, because not voluntary. On behalf of the people, the learned Attorney General contends that the general rule now is that if the person coming before the coroner's jury is not under arrest at the time he testifies, whether he comes with or without process, his statements at the inquest can be used against him in a trial under indictment or information charging him with the particular crime then under investigation.

The particular question presented by the record in this case has been discussed by many courts in England and in this country, and has also been the subject of discussion by learned writers on criminal law. In this state it is one of first impression, and we are free to determine it by the application of those principles which should control with due regard to the rights of the accused and the people. All the authorities agree that voluntary admissions of a party are admissible as testimony at his trial for the crime to which the admissions relate. The apparent conflict in the authorities arises on the proposition as to when admissions by a party before a coroner's jury are to be deemed voluntary, and when not. The text-writers, in treating of this subject, say, in substance, that the mere fact that at the time of the inquest the party was suspected of the homicide will not exclude his incriminating statements made to the coroner's jury, if they are voluntary. Underhill on Evidence, §131; Whart. on Crim. Ev. (9th Ed.) §664. In 3 Russell on Crimes, \*412, it is said:

"And it may be laid down generally that a statement upon oath by a person not being a prisoner, and where no suspicion attached to him, the statement not being compulsory nor made in consequence of any promise of favor, is admissible in evidence against him on a criminal charge." The early English cases held that the statements under oath of a person before a coroner's jury, although not then specifically charged with the crime, were not receivable in evidence against him when on trial for the murder being investigated. *Rex v Lewis*, 6 Carr & Payne, \*161; *Regina v. Owen*, 9 Carr & Payne, 149. The conclusion in these cases seems to be based upon the theory that statements by the accused under oath could not be regarded as voluntary. Greenleaf, in his work on Evidence, §. 225, in speaking on the subject, says: "But it is to be observed that none but voluntary confessions are admissible, and that if to the perplexities and embarrassments of the prisoner's situation are added the danger of perjury and the dread of additional penalties, the confession can scarcely be regarded

as voluntary; but, on the contrary, it seems to be made under the very influences which the law is particularly solicitous to avoid." In discussing this question, the Supreme Court of Kansas, in *State v. Taylor*, 36 Kan. 329, 13 Pac. Rep. 550, held that the testimony of a defendant taken at a coroner's inquest could be read at his trial on behalf of the state, where it was given not under duress, or where the defendant was not compelled by subpoena or otherwise to give his testimony at the inquest. *Twigg v. State* (Tex. Cr. App.) 75 S. W. Rep. 531, was a case where the defendant testified as a witness before a grand jury, then engaged in investigating a case against a third person. The defendant was before the grand jury by virtue of an attachment issued. From his examination a case against him was developed. He was subsequently indicted for perjury predicated upon his testimony before the grand jury. At his trial on this charge his statements before the grand jury were admitted on behalf of the state. The court held that where a defendant is under arrest or constraint, or held as a witness, and testifies about an offense of which he is suspected his statements in regard to such matters cannot be used against him unless previous to making them he was warned. In *Farkas v. State*, 60 Miss. 847, it was decided that testimony given before a coroner's jury investigating a homicide by one under arrest because suspected of having committed the crime is not admissible in evidence against him when tried upon an indictment subsequently found, charging him with the commission of the crime investigated by the coroner's jury. In *State v. O'Brien*, 18 Mont. 1, 43 Pac. Rep. 1091, 44 Pac. Rep. 399, it was held that it was error to admit the statements of a defendant before the coroner to be introduced at his trial for the homicide being investigated, where it appeared that he was called before that official immediately after the homicide, and testified without any knowledge of his lawful rights, without the aid of counsel, and under the belief that he had to answer the questions put to him. In *State v. Clifford*, 86 Iowa, 550, 53 N. W. Rep. 299, 41 Am. St. Rep. 518, it was held that where one accused of a crime is taken before a grand jury by its direction, and not by his own volition, statements then made by him without being informed of his rights, or of the possibility of their being used in evidence against him, are not admissible on a trial for the offense to which the statements related, since they were not voluntarily made. In *Wilson v. State*, 110 Ala. 1, 20 South. Rep. 415, 55 Am. St. Rep. 17, it was held (quoting from the syllabus) that: "On a trial for murder, the statements made by the defendant on his examination at the coroner's inquest, at which time he was neither under arrest nor accused of the crime, are admissible in evidence, and the fact that such statements were made under oath does not render them involuntary and inadmissible." The gist of the decision, however, is contained in the last paragraph of the opinion, wherein it is stated:

"The weight of authority and sound principle favor the rule that the statements of a witness before a coroner, given in under oath, not charged with the offense, and not under arrest, there being no constraint, are admissible in evidence against him."

*Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721, and *Teachout v. People*, 41 N. Y. 7, appear to be regarded by text-writers and other courts following the views announced in these cases as the leading ones supporting the contention of the Attorney General. They appear to be based upon the proposition that in all cases where a party is not under arrest or before an officer on a charge of homicide, in testifying at a coroner's inquest he is to be regarded merely as a witness, and, although he might refuse to testify, unless he does so, or is compelled to answer after having declined to do so, his statements are to be regarded as voluntary. It will be observed, however, in the *Teachout* Case, the defendant was informed by the coroner that rumors implicated him, and that he had a right to refuse to testify. In *People v. Mondon*, 103 N. Y. 211, 8 N. E. Rep. 496, 57 Am. Rep. 709, the Court of Appeals reaffirms the doctrine announced in the *Hendrickson* and *Teachout* cases, but holds that, if at the time of the examination of a defendant before the coroner's jury, it appears that a homicide has been committed, and that he is in custody as the supposed criminal, he is not regarded merely as a witness, but as a party accused, and is to be treated in the same manner as if brought before a committing magistrate. Indiana appears to have followed the New York cases in *Eppe v. State*, 102 Ind. 539, 1 N. E. Rep. 491, and *Davidson v. State*, 135 Ind. 254, 34 N. E. Rep. 972, although in the latter case the decision of the court appears, to some extent, to be based upon the provision of a statute of the state (section 1802, Rev. Stat. 1881) which the court construes as rendering all confessions by an accused admissible in evidence against him, except such as are made under the influence of fear produced by threats. *Lovett v. State*, 60 Ga. 257, holds that the minutes of evidence given by the prisoner before the coroner are admissible on his trial for the homicide to which the inquest related, but does not state the conditions under which such testimony was given before the coroner. In *State v. Mullins*, 101 Mo. 514, 14 S. W. Rep. 625, the testimony of a defendant given before a coroner at an inquest was held admissible because, from the circumstances of that case, the defendant was to be treated as one occupying the position of a defendant at a preliminary examination, and, as he would have a right to testify at such examination, his statements were admissible against him, provided he testified without compulsion. In *State v. Gilman*, 51 Me. 206, it was held that, on a trial for murder, the prisoner's testimony at the coroner's inquest upon the body of the person alleged to have been murdered, given without objection by him before his ar-

rest, though after he had been charged with the murder, but who had been cautioned that he was not obliged to testify to anything which might incriminate himself, was admissible. *Dickerson v. State*, 48 Wis. 288, 4 N. W. Rep. 321, and *Burnett v. State*, 87 Ga. 622, 13 S. E. Rep. 552, simply hold that testimony given by a defendant as a witness at the trial of another for murder, but while under arrest upon suspicion of having committed the same crime—there being no reason for believing that such testimony was not entirely voluntary—is admissible against him at a trial for the same offense.

The foregoing are the principal cases cited by respective counsel. From these cases it appears that in some jurisdictions it is held that the statements of a party under oath before the coroner's jury are not to be regarded as voluntary, while in others the converse is held; that, where a party is under arrest at the time he testifies before a coroner's jury, his statements are not to be regarded as voluntary unless he was fully warned; that, if the party testifying is accused of the crime under investigation, although not formally arrested or if he is suspected of the crime at the time he testifies, and knows this fact, that in some cases it is held his testimony is voluntary, and in others not; and that the New York cases are, as before indicated, based upon the proposition that, until a party is under arrest or taken in charge for the commission of the homicide, he is to be regarded at the coroner's inquest the same as any other witness, and, unless he claims the privilege of not making statements which may tend to incriminate him, or requests to be excused from testifying, he will be presumed to have done so voluntarily. It is impossible to reconcile the various cases to which we have referred, when considered in connection with the facts disclosed upon which they are respectively based. Possibly the conflict is the result of a failure to contradict distinguish "voluntary" and "involuntary" admissions, or to observe that the word "voluntary" is not in all instances used in contradistinction to "compulsory." Failure to claim the privilege of not being required to make incriminating statements, or testifying without objection at inquests seems in some cases to have been regarded sufficient from which to deduce the conclusion that testimony was voluntary, without considering whether or not extraneous influence was the inducing cause of the statements by the accused. After all, as pertinently remarked in *State v. Young*, 119 Mo. 495, 510, 24 S. W. Rep. 1038, and *State v. Gillman*, *supra*, the important question to determine in cases of this character is, was the statement voluntary? If this question can be answered in the affirmative, then the statement is clearly admissible on a principle, the soundness of which is not disputed; but, if not voluntary, or if obtained by any degree of coercion, then it must be rejected. No hard and fast rule can be formulated which would serve as the test in every

instance, but each case must be determined upon its own circumstances. The mere fact that an oath is or is not administered cannot ordinarily of itself serve as a true test. Some persons might believe that, after service of a subpoena and the administration of an oath, they would be compelled to answer all questions, while others would not be so influenced. Surrounding circumstances must necessarily in almost every case be taken into consideration in determining whether a statement was voluntary or not, and that question ought to be determined from the facts, and not by the application of any technical rule. A party might appear before a coroner's jury without process, and testify, and state that he did so voluntarily, and yet circumstances might be such that he was impelled to do so by extraneous influences. If the testimony of a party who is actually under arrest, charged with the homicide being investigated, given before a coroner's jury under certain conditions, is not admissible, it is difficult to state any reasonable ground which would make that same testimony under the same conditions admissible because he was not under arrest, although at the time he knew he was suspected of the crime being investigated, and was aware of that fact. The consequence of statements in the one case should be no different from what they would be in the other, and the same reasons which would render his testimony inadmissible in the first instance ought to have the same effect in the second, because in neither case should it be presumed that he would voluntarily make any statements tending to fasten the crime upon himself, nor can he be required to do so. The distinction attempted to be drawn as to when a defendant is to be regarded as a party to an investigation by a coroner, and when merely a witness, does not appear to rest upon a solid ground, when it is taken into consideration that the question of the admissibility of the statements at the inquest turns upon the proposition as to whether they are voluntary or not. A party can no more be required to involuntarily incriminate himself when not under arrest than when he is and the fact that he is or is not a party, or is or is not under arrest, falls far short of furnishing a test by which the voluntariness of his statements may be determined.

A statement, to have been voluntarily made, must proceed "from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause." *State v. Clifford, supra*. From this definition it seems to us clear that the statements of the defendants before the coroner's jury cannot be regarded as voluntary, when all the surrounding circumstances are considered. True, they were not under arrest; they did not claim the privilege of refusing to testify because their statements might tend to incriminate them, or because of the fact that they were suspected of being guilty of the homicide; but, in all probability, why? To have made such claims would have tended to increase sus-

picion against them, instead of allaying it, and, in the state of the temper of the community where the homicide had occurred, would almost certainly have resulted in their immediate arrest. They were thus placed in a position where they must necessarily have realized that they were obliged to answer every question propounded to them, or suffer the serious consequences which would almost certainly have followed. 1 Greenleaf, § 225, in treating this subject, says: "The manner of examination is therefore particularly regarded, and if it appears that the prisoner had not been left wholly free, and did not consider himself to be so in what he was called upon to say, or did not feel himself at liberty wholly to decline any explanation or declaration whatever, the examination is not held to have been voluntary."

One reason why admissions against interest by parties accused of crime are only admissible when voluntary is that they should be received with great caution, because they may not be true, for the mind of an accused, when oppressed by the calamity of his situation, is often influenced by hope or fear to make an untrue statement, when, as a matter of fact, the truth would be better. On this subject the Supreme Court of New York, in *People v. McMahan*, 15 N. Y. 384, says: "The principle upon which this rule is based is obvious. It is that we cannot safely judge of the relation between the motives and the declarations of the accused when to the natural agitation consequent upon being charged with crime is superadded the disturbance produced by hopes or fears artificially excited." The wisdom of this rule is particularly apparent in the present case. The statements made by the defendants before the coroner's jury are claimed on behalf of the state to be untrue, and much stress is laid on the untruthfulness of these statements, as tending to establish their guilt. Their desire to ward off suspicion at the time they were called before the coroner may have prompted these statements, although untrue. We are of the opinion that, in the circumstances of this case, the statements made by the defendants before the coroner's jury were not voluntary, and it was error to admit them at the trial.

There is an additional reason why the statements of the defendants before the coroner's jury should be excluded. The Constitution of the state (section 18, art. 2) provides that "no person shall be compelled to testify against himself in a criminal case." This provision was not intended merely for the protection of the individual in a criminal prosecution against himself, but its purpose was to insure that a person could not be required, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. *Counselman v. Hitchcock*, 142 U.S. 547, 12 Sup.Ct. Rep. 195, 35 L. Ed. 1110; *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22. Any other rule would render it possible to deprive parties of the constitutional

safeguard referred to. Officials engaged in ferretting out crime could refrain from arresting or taking into custody those suspected of its commission, and, under the guise of bringing before a coroner's jury as witnesses persons who would be afraid to assert their constitutional rights, secure from their own lips testimony which could afterwards be used against them. This, though an indirect way of seeking to avoid the constitutional provision, would as directly deprive persons of its protection as though they had been required to give testimony against themselves after arrest.

The Attorney General contends that the admissions made were not confessions of guilt, and for that reason do not come under the general rule regulating the admissibility of confessions. We do not think this objection is tenable. The constitutional provision was not intended to merely protect a party from being compelled to make confessions of guilt, but protects him from being compelled to furnish a single link in the chain of evidence by which his conviction of a criminal offense might be secured. *State ex rel. Attorney General v. Simmons Hardware Co.*, 109 Mo. 118, 18 S. W. Rep. 1125, 15 R. L. A. 676; *State v. Spier*, 86 N. Car. 600.

Crimes should be punished. Officials are to be commended for taking prompt steps to apprehend criminals, but, whatever may be the opinion of a community with respect to the guilt of those accused of crime, or however convincing the testimony may be against them, their rights guaranteed by the Constitution must be respected.

The judgment of the district court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

**NOTE.—Admissibility of Testimony on Preliminary Examination as an Admission.**—The testimony given by the defendant on his preliminary examination, and which is reduced to writing and signed by him, is admissible in evidence against him. *State v. Miller*, 35 Kan. 328; *Hill v. State*, 64 Miss. 431. Thus the testimony of a man, on trial for murder, given on a coroner's inquest, may be used against him on his trial. *Mack v. State*, 48 Wis. 271, 4 N. W. Rep. 449; *People v. Thayers*, 1 Parker Cr. R. 595; *Williams v. Commonwealth*, 29 Pa. St. 102. So, also, the official minutes of a defendant's testimony before a committing magistrate, on examination into the guilt of another, are competent evidence against him, after the magistrate has identified them and sworn to their correctness. *Griggs v. State*, 59 Ga. 738. So also it has been held that on a trial of an indictment for murder, a statement freely made by the accused at an inquest at the death and signed by him, was admissible, whether the coroner's jury was legally organized or not. *Snyder v. State*, 59 Ind. 105. So also it has been held that under a statute permitting a defendant to testify if he sees fit, evidence given and reduced to writing, and signed by him at the coroner's inquest, is admissible against him on his trial, where it is not shown that his testimony was not given of his own accord. *State v. Mullins*, 101 Mo. 514, 14 S. W. Rep. 625. So also it has been held that the record of the examination before a justice is evidence on the trial of the prisoner, even if it show only refusals to answers.

*People v. Banker* (N. Y.), 2 Farker Cr. R. 26. So also it has been held, that, on a trial for burglary evidence is competent that the prisoner had testified at the preliminary examination that he had borrowed a sum of money, corresponding with the amount stolen, from a certain party, and that such person testified that he never loaned prisoner any money. *State v. Rowe*, 98 N. Car. 629, 4 S. E. Rep. 506.

It is easily a safe rule not contradicted by any authority that a defendant's testimony before a coroner's inquest, is admissible in evidence against him, where such testimony was given without objection by him, before his arrest, though after he had been charged with the crime, and after being cautioned that he was not obliged to testify to anything that might criminate himself. *State v. Gilman*, 51 Me. 206. It is evident, however, that the authorities have gone further than that. Thus in the case of *People v. Mondon* (N. Y.), 38 Hun, 188, one arrested for murder was taken before a coroner, sworn, and questioned without being warned. He made no confession tending to prove him guilty, but some of his statements were untrue. The court held that what he said was admissible against him on his trial for murder. So also it has been held unnecessary that the examination before a committing magistrate be signed by him in order to make it evidence on his trial. *People v. Johnson*, 1 Wheeler, Cr. Cas. 193. In *State v. Rover*, 13 Nev. 17, it was held that a magistrate may select a clerk to write out the testimony taken on the preliminary examination, and that when the law for taking such testimony has been complied with, the testimony of defendant is admissible against him on the trial of the case.

The case that carries the rule to the limit is the case of *State v. Duffy*, 57 Conn. 525, 18 Atl. Rep. 791, where the court held that a justice of the peace, before whom a case is first tried may properly be allowed to testify in the superior court on appeal as to admissions made by defendant in his testimony on the trial before him.

The prisoner's testimony before the grand jury is no more inviolable than his testimony before a coroner. Thus it has been held that when a witness, examined before a grand jury, in examining a certain offense is afterwards indicted for that particular offense his testimony before the grand jury may be given in evidence against him. *State v. Broughton*, 29 N. Car. (7 Ired.) 96, 45 Am. Dec. 507.

Such testimony may likewise be used in defendant's favor as well as against him. Thus in the case of *State v. Ellis*, 97 N. Car. 447, 2 S. E. Rep. 525, it was held, that where a defendant was sworn at his own request, on a preliminary examination upon a charge of larceny, and then testified that he had falsely confessed the commission of the crime to the owner of the property, upon the representations of the jailor that he could thereupon compromise the matter and secure his release, such testimony is admissible on a subsequent trial for the offense.

There are authorities, however, which oppose the view announced in the preceding cases. Thus it has been held that a statement made by a prisoner before an examining magistrate is not competent as evidence, either for or against him. *State v. Marshall*, 36 Mo. 400. Thus also it has been held that the certified examination of the prisoner upon a criminal charge before the magistrate, could not be read upon his trial in his own defense. *Atkins v. State*, 16 Ark. 568. So also when testimony before a magistrate is signed and certified by the magistrate it is inadmissible. *State v. Hatcher*, 29 Oreg. 309, 44 Pac. Rep. 584.

## HUMOR OF THE LAW.

A negro who was giving evidence in a Georgia court was reminded by the judge that he was to tell the whole truth.

"Well, ye see boss," said the dusky witness, "I've skeerd to tell the whole truth for fear I might tell a lie."

Judge (to witness): Do you know the nature of an oath.

Witness: Sah?

Judge: Do you understand what you are to swear to?

Witness: Yes, Sah; I'm to swar to tell de truf.

Judge: And what will happen if you do not tell the it?"

Witness: I 'spects our side'll win de case sah.

## WEEKLY DIGEST.

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1. ACCIDENT INSURANCE—Liability Policy—Action by Employee.—If an employee has a right to enforce his judgment for personal injuries against the insurer under an employers' indemnity policy, his remedy is to attach the debt due by trustee process, rather than by direct action against the insurer.—Connolly v. Bolster, Mass., 72 N. E. Rep. 981.

2. ACCOUNT STATED—Dealing in Margins.—Defendant having denied the validity of an entire transaction, his subsequent silence after receiving an account of the same from plaintiff's assignor held not to render such account an account stated.—Jacobs v. Cohn, 71 N. Y. Supp. 389.

3. ACKNOWLEDGMENT—Sufficiency.—Sufficiency of the acknowledgment of a deed made by a trustee to show that the notary knew the trustee to be such.—Thomas v. Wilcox, S. Dak., 101 N. W. Rep. 1072.

4. ACTION—Misjoinder of Causes.—A cause of action against the president of a corporation for breach of contract cannot be joined with a cause for wrongful appropriation of corporate funds.—Stoddard v. Bell & Co., 91 N. Y. Supp. 477.

5. ADOPTION—Inheritance from Adopted Child.—Property given by an adopted parent to an adopted child under a mistake of law that the parent would inherit on the child's death held not to revert to the parent on the child's death.—White v. Dotter, Ark., 83 S. W. Rep. 1032.

6. ADULTERY—Sufficiency of Indictment.—An indictment for adultery with A, alleging defendant was married to L, held not required to allege he was not married to A.—Lee v. State, Tex., 83 S. W. Rep. 1110.

7. APPEAL AND ERROR—Administrator—Sale of Realty.—In proceedings to sell real estate by an administrator, where no motion for a new trial is filed, the supreme court, on error, will examine the sufficiency of the pleadings to sustain the judgment.—Bixby v. Jewell, Neb., 101 N. W. Rep. 1026.

8. APPEAL AND ERROR—Conclusiveness of Verdict.—A verdict cannot be interfered with as the result of prejudice or passion, and against the weight of the evidence, where there is no complaint that it is excessive.—Bond v. Chicago, B. & Q. Ry. Co., Mo., 84 S. W. Rep. 124.

9. APPEAL AND ERROR—Conflicting Evidence.—A finding on conflicting evidence is presumptively correct, and will not be disturbed on appeal, unless a serious mistake has been made as to the facts, or obvious error as to the law.—Dodge v. Norlin, U. S. C. C. of App., Eighth Circuit, 133 Fed. Rep. 363.

10. APPEAL AND ERROR—Descriptio Personae.—Designation of party throughout pleadings and record as "administrator" held not *descriptio personae*, and an appeal by him would not be dismissed as one taken in his own right.—Altgelt v. Elmendorf, Tex., 84 S. W. Rep. 412.

11. APPEAL AND ERROR—Failure to Assign Cross-Error.—Where an appellee assigns no cross-error on a ruling against him, his objection thereto cannot be considered on appeal.—United States Express Co. v. Joyce, Ind., 72 N. E. Rep. 865.

12. APPEAL AND ERROR—Findings of Trial Court.—The finding of the trial court will be reversed, when it is clearly apparent that it resulted from a misapprehension of the force and effect of a group of circumstances.—Rosenbloom v. Cohen, 91 N. Y. Supp. 382.

13. APPEAL AND ERROR—Instructions.—Rulings of the trial court in giving and refusing instructions held not open to question by raising them for the first time in a motion for a new trial.—Carpenter v. Rosenbaum, Ark., 83 S. W. Rep. 1047.

14. APPEAL AND ERROR—Justice of Peace—Jurisdictional Amount.—Where amount in controversy is below the original jurisdiction of the district court, the requisites necessary to confer jurisdiction by appeal from justice must appear, to enable the court of civil appeals to review.—Texas & P. Ry. Co. v. Jordan, Tex., 83 S. W. Rep. 1005.

15. APPEAL AND ERROR—New Matters Adverse to Appellee.—An affirmation on appeal is no obstacle to the opening of the judgment in the trial court on account of a defense arising after rendition of judgment.—Camden Interstate Ry. Co. v. Lee, Ky., 84 S. W. Rep. 332.

16. APPEAL AND ERROR—Theory of Case.—Where a case was tried on the assumption that a count stated a cause of action, the sufficiency of such count cannot be questioned on appeal.—Greenstein v. Chick, Mass., 72 N. E. Rep. 955.

17. APPEAL AND ERROR—Weight of Evidence.—Failure of defendant to move at the close of plaintiff's case at the trial in a municipal court for a dismissal of the complaint held not to preclude a reversal on the ground that the judgment was against the weight of evidence.—Engel-Beller Co. v. Dineen, 91 N. Y. Supp. 386.

18. BAILMENT—Injury to Horse.—The burden is on a bailee to show that injury to a horse in his possession was without negligence on his part.—Powers v. Jughardt, 91 N. Y. Supp. 556.

19. BANKRUPTCY—Appellate Jurisdiction.—Bankr. Act, ch. 541, § 24a, vests in the circuit courts of appeals appellate jurisdiction in bankruptcy proceedings over which those courts would have had jurisdiction, if the contro-

versies had arisen in the other cases outside of proceedings in bankruptcy.—*Dodge v. Norlin*, U. S. C. C. of App., Eighth Circuit, 133 Fed. Rep. 363.

20. **BANKRUPTCY—Assignment for Benefit of Creditors.**—Rev. Laws, ch. 147, § 21, 22, concerning assignments for the benefit of creditors, held superseded by national bankruptcy act, so that trustee in bankruptcy cannot avoid an assignment for benefit of creditors executed more than four months prior to filing petition, merely because the trustee in the assignment failed to deposit copy in office of town clerk.—*Hoague v. Cumner*, Mass., 72 N. E. Rep. 956.

21. **BANKRUPTCY—Compelling Attendance of Witnesses Out of State.**—Under the proviso to Bankr. Act, ch. 541, § 41a, that "no person shall be required to attend as a witness before a referee at a place outside of the state of his residence and more than 100 miles from such place of residence," a person cannot, because of Rev. Stat. § 876, be compelled to leave the state wherein he resides to be a witness before a referee in bankruptcy.—*In re Cole*, U. S. D. C., D. Me., 133 Fed. Rep. 414.

22. **BANKRUPTCY—Composition—Petition to Set Aside.**—Leave to file a petition to set aside the confirmation of a composition in bankruptcy should be refused only when the petition on its face shows that upon the facts stated the petitioner cannot under any circumstances be entitled to relief.—*In re Allen B. Wrisley Co.*, U. S. C. C. of App., Seventh Circuit, 133 Fed. Rep. 385.

23. **BANKRUPTCY—Judgment Avoiding Chattel Mortgage.**—A judgment in bankruptcy that a chattel mortgage on the property of the bankrupt was voidable by his trustee, and that the mortgagee had no lien, is a final decision, which may be reviewed by appeal.—*Dodge v. Norlin*, U. S. C. C. of App., Eighth Circuit, 133 Fed. Rep. 363.

24. **BANKRUPTCY—Trove and Conversion.**—In trover by a trustee in bankruptcy against the wife of the bankrupt, who was alleged to have converted funds of the bankrupt to her own use, whether the transfer was made by the bankrupt with an actual intent to defraud future creditors held a question for the jury.—*Mowry v. Reed*, Mass., 72 N. E. Rep. 986.

25. **BANKS AND BANKING—Negligence—Draft with Bills of Lading.**—In an action by the seller of goods against a bank, which had wrongfully surrendered the bill of lading for the goods, attached to a draft for the purchase price, the measure of damages determined.—*People's Nat. Bank v. Brogden & Bryan*, Tex., 83 S. W. Rep. 1098.

26. **BANKS AND BANKING—Savings Deposit—Husband and Wife.**—Order executed by husband and wife directing individual deposits in savings bank to be paid to the survivor held executory, and revocable until acted upon by the bank.—*Augsbury v. Shurtliff*, N. Y., 72 N. E. Rep. 927.

27. **BANKS AND BANKING—Transfer of Deposits—Gifts Causa Mortis.**—Payment by savings bank to one other than depositor held no protection to the bank as against depositor's estate, unless there had been a gift of the deposit to the one to whom payment was made.—*O'Brien v. Elmira Sav. Bank*, 91 N. Y. Supp. 364.

28. **BIGAMY—Indictment—Formal Parts.**—An indictment for bigamy must conclude with the formula "against the peace and dignity of the state."—*Poss v. State*, Tex., 83 S. W. Rep. 1109.

29. **BILLS AND NOTES—Consideration—Burden of Proof.**—Where defendant, in an action on a note reciting a consideration, offers no evidence tending to show what the consideration was, or want of consideration, dismissing the complaint at the close of the evidence was error.—*Harris v. Buchanan*, 91 N. Y. Supp. 484.

30. **BILLS AND NOTES—Ownership Where Payable to Bearer.**—Where a note payable to bearer is presented for discount, the presumption is that the bearer is the owner of the note.—*Massachusetts Nat. Bank v. Snow*, Mass., 72 N. E. Rep. 959.

31. **BILL OF EXCEPTIONS—Divorce—Alimony.**—Though the bill of exceptions does not specify the date of the

motion for a new trial, the omission is not fatal, where it is supplied by the record.—*Lambert v. Lambert*, Mo., 84 S. W. Rep. 203.

32. **BREACH OF MARRIAGE PROMISE—Mutuality of Promise.**—A promise by plaintiff to marry defendant "on his request," in consideration of defendant's promise to marry plaintiff "on his request," held unenforceable for want of mutuality.—*Smythe v. Greacen*, 91 N. Y. Supp. 450.

33. **BROKERS—Commissions—Sale or Exchange.**—Taking other land for a part of the price of land sold held to constitute a sale entitling the broker to compensation under his contract with the vendor.—*Ullmann v. Land*, Tex., 84 S. W. Rep. 294.

34. **BROKERS—Quantum Meruit.**—A broker, having sued on an express contract, and having proved partial performance only, held not entitled to recover on a *quantum meruit*.—*Veatch v. Norman*, Mo., 84 S. W. Rep. 350.

35. **CARRIERS—Ratification—Mistake of Fact.**—One who ratified a sale of his stock by his broker under a mistake of facts held entitled, on discovering the truth, to either disaffirm or affirm the sale.—*Stewart v. Harris*, 91 N. Y. Supp. 438.

36. **CARRIERS—Alighting from Moving Train.**—Passenger, alighting from moving train, held entitled to assume that the train was not moving faster than the rate authorized by an ordinance of the city in which it was running.—*St. Louis & Northwestern Ry. Co. of Texas v. Highnote*, Tex., 84 S. W. Rep. 365.

37. **CARRIERS—Conversion—Loss by Carrier.**—The failure of an express company to deliver goods intrusted to it for carriage, or to return them on demand, because of their loss, does not constitute a conversion by it of the goods.—*Goldbowitz v. Metropolitan Express Co.*, 91 N. Y. Supp. 315.

38. **CARRIERS—Injury to Alighting Passenger.**—The fact that a passenger, alighting from a street car, placed himself in a position of danger, held not to show contributory negligence as matter of law.—*Johnson v. Vonkers R. Co.*, 91 N. Y. Supp. 508.

39. **CARRIERS—Injury to Passenger on Running Board.**—A passenger on the running board of a street car, struck by the shaft of a wagon, held guilty of contributory negligence.—*Rosen v. Dry Dock, E. B. & B. R. Co.*, 91 N. Y. Supp. 333.

40. **CARRIERS—Injury to Person on Platform.**—A petition alleging that plaintiff purchased a ticket of defendant, and was injured while standing on the platform of defendant's station, held not to set forth an action *ex contractu*.—*Fremont, E. & M. V. R. Co. v. Hagblad*, Neb., 101 N. W. Rep. 1032.

41. **CARRIERS—Passengers—Assault by Servant.**—A street railway company held not liable for an assault by a conductor on one who ceased to be a passenger.—*Reily v. New York City Ry. Co.*, 91 N. Y. Supp. 319.

42. **CARRIERS—Speed of Train.**—In action against railroad for death of a section hand struck by a train, evidence held to show that the circumstances were not such as to make a speed of 18 or 20 miles an hour negligence of itself.—*Helm v. Missouri Pac. Ry. Co.*, Mo., 84 S. W. Rep. 5.

43. **CHATTEL MORTGAGES—Colorado Statutes—Bankruptcy.**—A chattel mortgage is voidable by creditors in Colorado, if it covers merchandise and the mortgagee consents to its sale in the usual course of business, without requiring application of the proceeds to the mortgage debt.—*Dodge v. Norlin*, U. S. C. C. of App., Eighth Circuit, 133 Fed. Rep. 363.

44. **CONSPIRACY—Gist of Action.**—It is not the conspiracy, but the acts which are done in pursuance thereof, that form the basis of a cause of action.—*Green v. Davies*, 91 N. Y. Supp. 470.

45. **CONSPIRACY—Scheme to Defraud—Using the Mails.**—It is not a valid objection to an incident charging accused with conspiring to defraud persons unknown to the grand jury that it shows that the defendants were

also guilty of another offense, conspiring to defraud persons known to the grand jury.—*Miller v. United States*, U. S. C. of App., Eighth Circuit, 183 Fed. Rep. 337.

46. **CONSTITUTIONAL LAW—Due Process.**—*Kansas City Charter*, Art. 9, § 28, violates the constitutional guaranty of due process of law.—*Barber Asphalt Pav. Co. v. Munn*, Mo., 83 S. W. Rep. 1062.

47. **CONSTITUTIONAL LAW—Preferred Creditors.**—Acts 1903, p. 276 ch. 153, creating preferred creditors on sale of stock of merchandise, held void, as a violation of Const. U. S. Amend. 14, prohibiting denial of equal protection of the law, etc.—*McKinster v. Sager*, Ind., 72 N. E. Rep. 854.

48. **CONSTITUTIONAL LAW—Taxation—Statute.**—The constitutionality of a statute is to be tested by what the law authorizes to be done under its provisions.—*City of Beatrice v. Wright*, Neb., 101 N. W. Rep. 1039.

49. **CONTRACTS—Building Contracts—Arbitration.**—Absence of submission to arbitration of differences between contractor and owner held no bar to an action by the contractor to recover for extra work.—*Conrad v. Humphrey*, Ky., 84 S. W. Rep. 313.

50. **CONTRACTS—Construction—When Question for Jury.**—Where a written contract is explicit, its construction is for the court; but where it is indefinite, or a mistake is claimed to have been made, its construction is for the jury.—*Locke & Ellison v. Lyon Medicine Co.*, Ky., 84 S. W. Rep. 807.

51. **CONTRACTS—Excuse for Nonperformance.**—Plaintiff, who was not assigned a place for the erection of his apparatus by an amusement company, held excused from performance as to his part of the contract.—*Claudius v. West End Heights Amusement Co.*, Mo., 84 S. W. Rep. 354.

52. **CONTRACTS—Performance With Knowledge of Fraud.**—A party to an executory contract procured by false representation, who after knowledge thereof performs the contract and accepts payment according to its terms, waives the fraud.—*Baltimore & O. R. Co. v. Jolly Bros. & Co.*, Ohio, 72 N. E. Rep. 888.

53. **CONTRACTS—Time as Essence.**—Liability under an obligation for the payment of money for the construction of a railway held conditioned on the construction of the road within a specified time.—*Bes Line Construction Co. v. Wood*, Tex., 84 S. W. Rep. 378.

54. **CORPORATIONS—Collateral Attack.**—Whether a corporation was properly organized to authorize it to engage in the business it is pursuing cannot be raised collaterally.—*Thomas v. Wilcox*, S. Dak., 101 N. W. Rep. 1072.

55. **CORPORATIONS—Implied Contract.**—The president of a corporation engaged in manufacturing and selling hydraulic machinery, having equipped a college laboratory as a gift, from the corporation's assets, held liable on an implied contract therefor to the corporation.—*Henry R. Worthington v. Worthington*, 91 N. Y. Supp. 443.

56. **CORPORATIONS—Liability for Employment of Physician for Employees.**—A corporation held not liable for the services of a physician rendered to employees of the corporation at the request of the president and secretary.—*Harris v. Vienna Ice Cream Co.*, 91 N. Y. Supp. 317.

57. **CORPORATIONS—Wrongful Appropriation of Funds.**—An action against a corporate officer for wrongful appropriation of funds may only be maintained by the corporation, or by a stockholder in its behalf.—*Stoddard v. Bell & Co.*, 91 N. Y. Supp. 477.

58. **COSTS—Trespass to Try Title.**—Where before trial defendants in trespass to try title disclaimed, they were entitled to costs incurred by them after the filing of the disclaimer.—*Hamilton v. Saunders*, Tex., 84 S. W. Rep. 253.

59. **COURTS—Attachment—Corporate Stock.**—Sending a certificate of transfer of stock to the circuit clerk, in

county where the offices of circuit and county clerk are separate, held ineffectual to protect the transferee, under Sand. & H. Dig. § 1338.—*Scott v. Hout*, Ark., 83 S. W. Rep. 1057.

60. **CRIMINAL EVIDENCE—Bill of Exceptions.**—In a criminal case, where the testimony of defendant given on a former trial was admitted, error cannot be based thereon, in the absence of proper objection having been made, though it contain references to former offenses.—*Moree v. State*, Tex., 83 S. W. Rep. 1117.

61. **CRIMINAL LAW—Bribery.**—It was an offense at common law to solicit the commission of a misdemeanor.—*State v. Sullivan*, Mo., 84 S. W. Rep. 105.

62. **CRIMINAL TRIAL—Confessions.**—On a prosecution for theft, confessions of defendant to an officer held admissible.—*Gibson v. State*, Tex., 83 S. W. Rep. 119.

63. **CRIMINAL TRIAL—Order Denying Motion to Dismiss.**—Under the Code of Criminal Procedure, providing for appeals in criminal cases, an order denying defendant's motion to dismiss an indictment for want of prosecution held unappealable.—*People v. Martin*, 91 N. Y. Supp. 486.

64. **CRIMINAL TRIAL—Remarks of Counsel.**—On a prosecution for homicide, remark of the prosecuting attorney that the burden of proof was on defendant held not to be deemed prejudicial, in the absence of the balance of the argument.—*Mitchell v. State*, Ark., 83 S. W. Rep. 1050.

65. **CRIMINAL TRIAL—Statement of Facts—Authentication.**—The signature of the judge approving the record as correct held not a sufficient authentication of the statement of facts.—*Ex parte Wallace*, Tex., 83 S. W. Rep. 1110.

66. **CRIMINAL TRIAL—Sufficiency of Evidence.**—A judgment will not be set aside, as against the weight of the evidence, unless there is no substantial evidence in support of it.—*State v. Coleman*, Mo., 83 S. W. Rep. 1096.

67. **CRIMINAL TRIAL—Witness—Ability to Understand Oath.**—The determination of the trial judge that a witness understands the nature and obligation of an oath will not be disturbed on appeal, unless an abuse of discretion appears.—*Freasier v. State*, Tex., 84 S. W. Rep. 860.

68. **CUSTOMS AND USAGES—What Constitutes.**—A local custom, to be available in the construction of a contract, must have been known by the parties, or so general that they are presumed to have known thereof.—*John O'Brien Lumber Co. v. Wilkinson*, Wis., 101 N. W. Rep. 1050.

69. **DAMAGES—Earning Capacity.**—Where plaintiff lost a leg by reason of defendant's negligence, the jury was entitled to fix his damages for impaired earning capacity, without proof of his present earning capacity.—*Texarkana & Ft. S. Ry. Co. v. Toliver*, Tex., 84 S. W. Rep. 375.

70. **DAMAGES—Evidence as to Wages.**—In an action for personal injuries, plaintiff's testimony as to his average weekly wages is not subject to the objection of being "speculative and remote."—*Tanzer v. New York City Ry. Co.*, 91 N. Y. Supp. 334.

71. **DEEDS—Equitable Restrictions.**—Restriction in deed as to character of house to be built on premises held limited to the life of the first house, and not a restriction in perpetuity.—*Welch v. Austin*, Mass., 72 N. E. Rep. 972.

72. **DEPOSITIONS—Competency to Take.**—A deposition taken by a clerk and stenographer in the office of the attorney for one of the parties held subject to a motion to suppress.—*Knickerbocker Ice Co. v. Gray*, Ind., 72 N. E. Rep. 869.

73. **EASEMENTS—Continued User.**—On continued use of passway as a matter of right for over 25 years, the burden is on the party opposing such use to show that it was only permissive.—*Wathen v. Howard*, Ky., 84 S. W. Rep. 303.

74. **ELECTIONS—Contest—Amended Bill.**—Contestant in an election contest cannot file an amended bill setting forth additional grounds of contest, where he states

therein that he knew of the facts charged at the time he filed the original bill.—*Harmon v. Tyler, Tenn.*, 88 S. W. Rep. 1041.

75. **EMBEZZLEMENT—Ownership of Fund.**—A local lodge of a beneficial association held to have such ownership in a fund raised to be transmitted to the grand lodge as to justify an allegation in an indictment for embezzlement of the fund that it was owned by the local lodge.—*State v. Knowles, Mo.*, 88 S. W. Rep. 1083.

76. **ESTOPPEL—Carriers—Shipping Contract.**—Where plaintiff, in an action against a carrier, founds his claim on a shipping contract, he cannot contend that he was not bound by its terms.—*United States Express Co. v. Joyce, Ind.*, 72 N. E. Rep. 865.

77. **EVIDENCE—Certified Copy of Deed.**—A certified copy of a deed of trust held admissible, where defendant, to whom the original had been executed and delivered, failed to produce it after notice, or to give any sufficient reason therefor.—*Kothman v. Faselers, Tex.*, 84 S. W. Rep. 390.

78. **EVIDENCE—Damages—Failure to Deliver Telegram.**—In an action against telegraph company for negligence in failing to deliver a message tendering plaintiffs an option, testimony that they had an option, not in writing, held not hearsay.—*Western Union Tel. Co. v. L. Hirsch, Tex.*, 84 S. W. Rep. 394.

79. **EVIDENCE—Homicide—Character of Deceased.**—Defendant, in prosecution for homicide, held not entitled to base error on the exclusion of his testimony as to whether he knew deceased's character as to peace and quiet.—*Hellard v. Commonwealth, Ky.*, 84 S. W. Rep. 329.

80. **EVIDENCE—Judicial Notice.**—Courts take judicial cognizance of the fact that overflows are followed by disease and that swamps are a detriment to public health.—*Applegate v. Franklin, Mo.*, 84 S. W. Rep. 347.

81. **EVIDENCE—Time Required to Stop Car.**—Expert testimony as to the length of time and space within which an ordinary car can be stopped held admissible in an action for injuries to person on track.—*Meng v. St. Louis & Suburban Ry. Co., Mo.*, 84 S. W. Rep. 213.

82. **EXCHANGE OF PROPERTY—Agreement—Ambiguity.**—Where there has been a defective attempt to put in writing the terms of an agreement, parol evidence is admissible to show what the true agreement was.—*Locke & Ellison v. Lyon Medicine Co., Ky.*, 84 S. W. Rep. 307.

83. **EXCHANGE OF PROPERTY—Rescission—Fraudulent Misrepresentation as to Title.**—Where an exchange was accomplished by fraudulent representations of one party as to title to the land he conveyed, the other might have rescission.—*Corbett v. McGregor, Tex.*, 84 S. W. Rep. 278.

84. **EXECUTORS AND ADMINISTRATORS—Sale of Realty.**—Where a will contained a mandatory direction to executors to sell certain real estate on a certain contingency, the power could be properly exercised by an administrator with the will annexed.—*Ayers v. Courvoisier*, 91 N. Y. Supp. 549.

85. **EXTRADITION—Warrant—Habeas Corpus.**—It is not necessary, in the extradition proceedings, that the warrant issued by the governor should state that he has found the accused is a fugitive from justice.—*Ex parte Dennison, Neb.*, 101 N. W. Rep. 1045.

86. **FIRE INSURANCE—Breach of Warranty.**—Breach of warranty as to the title of land on which the insured building is located does not avoid the policy as to personalty situated in the building.—*Donley v. Glens Falls Ins. Co.*, 91 N. Y. Supp. 302.

87. **FIRE INSURANCE—Cancellation—Giving up Policy.** The fact that insured delivered up his policy after loss on the representations of the agent that he was insured in a substituted policy does not relieve defendant of liability on the repudiation of liability by the substituted company.—*Yoshimi v. Fidelity Fire Ins. Co.*, 91 N. Y. Supp. 392.

88. **FIRE INSURANCE—Rights of Mortgagee.**—In an action on a fire policy by insured and mortgagee of the property, a contention that mortgagee was not entitled

to recover held of no merit.—*Vesey v. Commercial Union Assur. Co., Limited, of London, England, S. Dak.*, 101 N. W. Rep. 1074.

89. **FIRE INSURANCE—Subrogation.**—In an action for loss by fire communicated by defendant's engine, rejection of evidence that plaintiff had transferred his cause of action to insurers held not cause for reversal.—*Missouri, K. & T. Ry. Co. of Texas v. Keahey, Tex.*, 83 S. W. Rep. 1102.

90. **FIXTURES—Removal by Tenant.**—Trade fixtures may, in general, be removed by the tenant before the expiration of the lease, if it can be done without destroying or materially injuring the premises.—*Cohen v. Wittmann*, 91 N. Y. Supp. 493.

91. **FORGERY—Evidence.**—In a prosecution for forgery, testimony that another once forged a check in the name of the person whose signature was forged to the instrument in question held inadmissible.—*Laudermilk v. State, Tex.*, 83 S. W. Rep. 1107.

92. **FRAUDS, STATUTE OF—Agent—Sale of Land.**—Letter of principal to agents held not an authorization in writing for the sale of lands, within the statute of frauds, Rev. St. 1899, § 3419.—*Johnson v. Fecht, Mo.*, 83 S. W. Rep. 1077.

93. **FRAUDS, STATUTE OF—Partial Performance.**—Where a contract unenforceable under the statute of frauds is repudiated by one party after it has been partially performed by the other, the latter cannot maintain an action at law for damages.—*De Montague v. Bacharach, Mass.*, 72 N. E. Rep. 938.

94. **FRAUDS, STATUTE OF—Pleading.**—A petition on a promise within the statute of frauds need not allege a promise in writing.—*Carson Bros. v. McCord-Collins Co., Tex.*, 84 S. W. Rep. 391.

95. **GARNISHMENT—Costs.**—The garnishee, having denied indebtedness both as against the garnishor and the garnishee's alleged creditor, in consolidated actions by them, held liable for the costs of both suits.—*Kothman v. Faselers, Tex.*, 84 S. W. Rep. 390.

96. **GUARDIAN AND WARD—Guardian's Sale—Setting Aside.**—A guardian's sale to the attorney of the guardian and minors held, on bill of review, to be set aside; the guardian and attorney having known that part of the proceeds were to be used and appropriated by the guardian.—*Parker v. Bowers, Tex.*, 84 S. W. Rep. 380.

97. **HABEAS CORPUS—Cross-examination.**—Where relator in *habeas corpus* gives evidence in his own behalf, he should not be cross-examined on matters not relating to his examination in chief.—*Ex parte Dennison, Neb.*, 101 N. W. Rep. 1045.

98. **HOMESTEAD—Conveyance—Husband and Wife.**—Act 1895, (Laws 1895, p. 185), rendering the husband incapable of conveying the homestead without the joining of the wife, did not apply to a homestead acquired before such enactment.—*Elliott v. Bristow, Mo.*, 84 S. W. Rep. 48.

99. **HOMESTEAD—Good Faith—Member of Family.**—A party, to be a member of a family within the homestead article of the constitution, must be a member in good faith.—*Adams v. Clark, Fla.*, 37 So. Rep. 734.

100. **HOMESTEAD—Right to Select.**—Where property claimed as a homestead exceeds the maximum area, the person entitled may make a selection of the proper amount, provided that the same does not offend against the rule against unreasonable or capricious selection.—*Grimes v. Luster, Ark.*, 84 S. W. Rep. 223.

101. **HOMESTEAD—Value—Exemption.**—A homestead of less value than \$2,000 cannot be disposed of at an administrator's sale, either to discharge incumbrances thereon or pay debts.—*Bixby v. Jewell, Neb.*, 101 N. W. Rep. 1026.

102. **HOMICIDE—Manslaughter.**—Passion and adequate cause held necessary to reduce a homicide to manslaughter.—*Hatchell v. State, Tex.*, 84 S. W. Rep. 234.

103. **HOMICIDE—Self-Defense—Apparent Danger.**—In charging on self-defense, and, in that connection, on threats made by deceased against defendant, the cri-

terion of apparent danger is as the situation is viewed from the standpoint of the defendant, and not as to the belief of danger by the jury.—*Adams v. State, Tex.*, 84 S. W. Rep. 231.

104. **INDEMNITY—Conditions Precedent.**—Bill in equity to compel covenantor on contract of indemnity to make payment directly to the creditor cannot be maintained, where the person indemnified has not performed a condition precedent under the contract of indemnity.—*O'Connell v. New York, N. H. & H. R. R. Co., Mass.*, 72 N. E. Rep. 979.

105. **INDICTMENT AND INFORMATION—Verification.**—Where an information is verified by the prosecuting attorney, based on a complaint made by the prosecuting witness, it is valid, regardless of any affidavit.—*State v. Naves, Mo.*, 84 S. W. Rep. 1.

106. **INJUNCTION—Violation.**—A party violating an injunction subsequently dissolved for an irregularity or want of equity held liable to punishment.—*Gulf, C. & S. F. Ry. v. Cleburne Ice & Cold Storage Co., Tex.*, 83 S. W. Rep. 1100.

107. **INSANE PERSONS—Appointment of Guardian.**—A wife having been regularly adjudged insane, the court of another county in which the husband acquired a residence may assume jurisdiction of her estate and appoint a guardian, without a sworn information showing her to be insane.—*Schwartz v. West, Tex.*, 84 S. W. Rep. 282.

108. **INTOXICATING LIQUORS—Constitutionality of Local Option.**—Local option law held not in conflict with Const. art. 16, § 20.—*Ray v. State, Tex.*, 83 S. W. Rep. 1121.

109. **INTOXICATING LIQUORS—License Law.**—The license law of 1897 (Laws 1897, p. 203, ch. 72) held not unconstitutional, as delegating to local communities power to prohibit or authorize the sale of intoxicating liquors.—*State v. Barber, S. Dak.*, 101 N. W. Rep. 1079.

110. **JUDGMENT—Collateral Attack.**—A judgment cannot be attacked collaterally, unless it affirmatively appears that the facts essential to the jurisdiction of the court did not exist.—*State v. Cloudt, Tex.*, 84 S. W. Rep. 415.

111. **JUDGMENT—Res Judicata.**—A judgment of the court of appeals in an action to vest title to land in plaintiff held *res judicata* in an action to recover the money furnished for its purchase.—*Holtheida v. Smith's Guardian, Ky.*, 84 S. W. Rep. 321.

112. **JUDGMENT—Municipal Corporation—Assessment Sale.**—In the absence of fraud or collusion, the city, though not a party thereto, is bound by a judgment declaring proceedings under a special assessment invalid.—*Otis v. City of St. Paul, Minn.*, 171 N. W. Rep. 1066.

113. **JUDICIAL SALES—Liability of Bidder for Refusal to Perform.**—A bidder at judicial sale, who refused to perform, held not liable for the difference between his bid and the amount received on the resale.—*Cowper v. Weaver's Admr., Ky.*, 84 S. W. Rep. 323.

114. **JUSTICES OF THE PEACE—Judgments by Surprise.**—Justice's judgment will not be sustained where he misled plaintiff as to the time when service was returnable and disposed of the case in his absence.—*Odum v. Carmona, Tex.*, 83 S. W. Rep. 1100.

115. **LANDLORD AND TENANT—Covenant to Repair.**—A lessee's covenant to repair held to cover ordinary repairs only, and not to require it to rebuild a gable wall which had become dilapidated by time and wear.—*Street v. Central Brewing Co.*, 91 N. Y. Supp. 547.

116. **LANDLORD AND TENANT—Duty to Repair.**—Where there is an agreement to repair, the landlord cannot be held liable for a defect, unless reasonable notice thereof is given him.—*Galvin v. Beals, Mass.*, 72 N. E. Rep. 969.

117. **LANDLORD AND TENANT—Liability of Sub-Lessee.**—A subtenant is chargeable with knowledge of the term of the lessee's lease.—*Missouri, K. & T. Ry. Co. of Texas v. Keahy, Tex.*, 83 S. W. Rep. 1102.

118. **LANDLORD AND TENANT—Notice to Landlord.**—Notice to the landlord that the tenant had rented other quarters and would vacate in a few days is not notice re-

quiring the landlord to invoke the provisions of a lease, authorizing him to eject another tenant for violating a rule of the house.—*Sefton v. Juillard*, 91 N. Y. Supp. 848.

119. **LANDLORD AND TENANT—Removal of Shutters—Consent of Landlord.**—A landlord, having consented to his former tenant's removal of certain of the shutters from the building and storing them on the premises, was not entitled to recover for such removal and for work and materials incident to their replacement.—*Cohen v. Wittemann*, 91 N. Y. Supp. 493.

120. **LICENSES—Buildings—Rights of Adjoining Owners.**—The owner of a saloon adjoining a hotel, with doors opening into the rotunda of the hotel, held to have an implied license to use such rotunda as a passageway.—*Belser v. Moore, Ark.*, 84 S. W. Rep. 219.

121. **LIFE ESTATES—Mortgage.**—A life tenant, who pays off a mortgage and conveys by warranty, thereby conveys, not only her life estate, but all she acquired by payment of the mortgage.—*Keller v. Fenske, Wis.*, 101 N. W. Rep. 1055.

122. **LIFE INSURANCE—Warranties.**—A warranty in name or form created by a contract of life insurance may be modified by other parts of the contract.—*Provident Sav. Life Assur. Soc. v. Pruett, Ala.*, 37 So. Rep. 700.

123. **LIFE INSURANCE—What Law Governs.**—Provision of New York law regulating forfeitures of life policies held not to govern a policy, application for which was made in Texas and which was delivered in Texas.—*Cowen v. Equitable Life Assur. Soc., Tex.*, 84 S. W. Rep. 404.

124. **LIMITATION OF ACTIONS—Suspension—Absence from State.**—Where a person resides in the state at the time of the accrual of an action against him, and then permanently removes from the state, the running of limitations is suspended until he returns to the state.—*Bemis v. Ward, Tex.*, 84 S. W. Rep. 291.

125. **MANDAMUS—Election Canvassing Board.**—Mandamus held not to lie to compel a canvassing board to reassemble and restore to its original condition a certificate of the returns, which had been changed under authority of the board.—*People v. Mattinger, Ill.*, 72 N. E. Rep. 906.

126. **MASTER AND SERVANT—Assumed Risk—Contributory Negligence.**—Plaintiff, a railroad bridge workman, injured by the falling of a bridge upon him as it was being lowered after having been jacked up, held guilty of contributory negligence precluding recovery.—*Fort Worth & R. G. Ry. Co. v. Robinson, Tex.*, 84 S. W. Rep. 410.

127. **MASTER AND SERVANT—Disobeying Rules—Concurring Negligence.**—Railroad held liable for injuries to an engineer, caused by disobedience of rule by another train, although such disobedience was not the sole cause of the injury, but merely a concurring cause.—*San Antonio & A. P. Ry. Co. v. L. ster, Tex.*, 84 S. W. Rep. 401.

128. **MASTER AND SERVANT—Fellow-Servants.**—A railroad company held not liable for injuries to an employee from negligence in the manner in which a bridge cap was struck by a fellow servant under direction of plaintiff's foreman.—*Depuy v. Chicago, R. I. & P. Ry. Co., Mo.*, 84 S. W. Rep. 103.

129. **MASTER AND SERVANT—Railroad Collision—Proximate Cause.**—In action against railroad for injury to engineer in collision with forward section of his train, defendant held not liable for negligence in having a freight box car caboose on the rear of the forward section, in violation of statute.—*Quinn v. Galveston, H. & S. A. Ry. Co., Tex.*, 84 S. W. Rep. 395.

130. **MINES AND MINERALS—Duty of Lessee.**—The lessee of a coal mine held bound under an implied covenant to work the mine with reasonable diligence.—*Price v. Black, Iowa*, 101 N. W. Rep. 1056.

131. **MORTGAGES—Deeds of Trust.**—The mortgagee in a mortgage subsequent to a deed of trust could not be prejudiced by any agreement subsequently made between the grantor in the deed of trust and others to which the

mortgagee was not a party.—*Leech v. Karthaus*, Ala., 37 So. Rep. 696.

132. MORTGAGES—Foreclosure—Relief from Purchase.—A purchaser at a foreclosure, who seeks relief from his purchase because of a defect in the title, may rest on a patent defect in the record title.—*Title Guarantee & Trust Co. v. Fallon*, 91 N. Y. Supp. 497.

133. MORTGAGES—Power of Sale.—Where a power of sale in a mortgage requires publication of notice thereof to be made in a particular paper, the identity of which is ascertainable, its publication in a different paper renders the sale thereunder invalid.—*Moore v. Dick*, Mass., 72 N. E. Rep. 969.

134. MUNICIPAL CORPORATIONS—Civil Service Appointment.—The determination of the civil service commissioners in rating candidates in competitive examinations held not reviewable either on *certiorari* or by *mandamus*.—*People v. McCooley*, 91 N. Y. Supp. 486.

135. MUNICIPAL CORPORATIONS—Operating Ferry—Negligence.—In an action against the city of Boston for negligence in the operation of a ferry operated by it under St. 1869, p. 497, ch. 155, held, that under an admission in the case defendant was to be treated as a common carrier.—*Townsend v. City of Boston*, Mass., 72 N. E. Rep. 991.

136. MUNICIPAL CORPORATIONS—Sewer Construction—Validity of Assessment.—Where a sewer was not constructed as authorized by the ordinance, the assessments therefor will be canceled at the suit of property owners.—*Barton v. Kansas City*, Mo., 83 S. W. Rep. 1093.

137. MUNICIPAL CORPORATIONS—Street Improvements.—Contract requiring street improvement to be completed in designated time held complied with by completion in reasonable time.—*Schibel v. Merrill*, Mo., 58 S. W. Rep. 1069.

138. MUNICIPAL CORPORATIONS—Street Improvements—Costs—Front Foot Rule.—The provisions of the Kansas City charter making land abutting on a street chargeable with the cost of improvements according to the front-foot rule is not unconstitutional.—*Barber Asphalt Pav. Co. v. Mann*, Mo., 83 S. W. Rep. 1062.

139. NEGLIGENCE—Intervening Negligence of Third Person.—One is liable for injuries of which his negligence was the proximate cause, though the negligence of a third person contributed to the injury.—*Townsend v. City of Boston*, Mass., 72 N. E. Rep. 991.

140. PARTITION—Right to Enforce Lien.—One not a party to a partition suit held entitled to enforce a lien given him by the decree.—*Stone v. McGregor*, Tex., 84 S. W. Rep. 899.

141. PARTITION—Using Action as Substitute for Ejectment.—An action of partition cannot be used as a substitute for ejectment, nor for the sole purpose of testing the legal title.—*Cumpp Phosphate Co. v. Anderson*, Fla., 87 So. Rep. 722.

142. PARTNERSHIP—Liability for Individual Debts.—The estate of one partner is not liable for money loaned to another partner as an individual.—*Altgelt v. Elmen-dorf*, Tex., 84 S. W. Rep. 412.

143. PERJURY—Sufficiency of Indictment.—An indictment for perjury in making an affidavit which is partly true should specify the part which is false.—*Morris v. State*, Tex., 83 S. W. Rep. 1126.

144. PLEDGES—Conversion by Pledgee.—The mere assertion of title by the pledgee does not constitute conversion, and entitles the pledgor to recover the value of the property in excess of the amount of the loan.—*Brown v. Leary*, 91 N. Y. Supp. 463.

145. PLEDGES—Lien—Abandonment.—Surrender of goods by a pledgee to a purchaser from the pledgor held to constitute an abandonment of the pledgee's lien.—*Thalman v. Capron Knitting Co.*, 91 N. Y. Supp. 520.

146. POST OFFICE—Scheme to Defraud.—The intentional use of a legal contract to defraud another may constitute a scheme to defraud, under Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696].—*Miller v. United States*, U. S. C. C. of App., Eighth Circuit, 133 Fed. Rep. 337.

147. STREET RAILROADS—Driving on Track.—It is the duty of one who needlessly drives upon the track of a street railway to look back at intervals for approaching cars.—*Schleicher v. Interurban St. Ry. Co.*, 91 N. Y. Supp. 356.

148. TAXATION—Personal Property—Valuation.—Where safety deposit vaults belonging to relator were constructed by it on leased land, evidence was admissible to show that such vaults, though apparently a part of the real estate, were not in fact so assessed.—*People v. Wells*, 91 N. Y. Supp. 283.

149. TAXATION—Setting Aside Tax Deed.—A holder of a tax deed is entitled to the taxes he has paid on the property.—*In re Lindner*, La., 37 So. Rep. 720.

150. TRIAL—Erroneous Rejection of Evidence.—The rejection of competent evidence on the ground that no evidence in support of the cause of action is admissible is not less erroneous because all the evidence necessary to sustain it was not presented.—*Platner Implement Co. v. International Harvester Co. of America*, U. S. C. C. of App., Eighth Circuit, 133 Fed. Rep. 376.

151. TRIAL—Instruction—Meaning Obscure.—Where a charge was strictly correct, defendant, if he deemed it not sufficiently distinct and explicit, should have requested a charge correcting the omission.—*San Antonio & A. P. Ry. Co. v. Lester*, Tex., 84 S. W. Rep. 401.

152. TRIAL—Misconduct of Juror—Proceeding With Eleven.—Misconduct of a juror held waived by defendant's consent to an order excusing him, and to proceed with 11 jurors.—*Texarkana & Ft. S. Ry. Co. v. Toliver*, Tex., 84 S. W. Rep. 375.

153. TRIAL—Special Charge.—It is not error to refuse a special charge, where the issue sought to be presented therein was submitted in the main charge.—*Missouri, K. & T. Ry. Co. of Texas v. Keahey*, Tex., 83 S. W. Rep. 1102.

154. TRUSTS—Agent's Authority to Purchase Real Estate.—Agent's authority to buy land need not be in writing, to make the trust enforceable, where he takes title himself.—*Morris v. Reigel*, S. Dak., 101 N. W. Rep. 1086.

155. VENDOR AND PURCHASER—Statute of Frauds.—Letters of agents to principal held a variation of contract for sale of lands, sufficient to relieve principal from carrying out contract.—*Johnson v. Fecht*, Mo., 83 S. W. Rep. 1077.

156. WATERS AND WATER COURSES—Surface Water—Drainage.—The only right of action which the owner of land submerged by surface water has for the drainage of the same by an owner of another part of the land is for trespasses committed in the prosecution of the work.—*Applegate v. Franklin*, Mo., 84 S. W. Rep. 347.

157. WILLS—Bequeathing Property Held in Trust.—A will bequeathing property held in trust considered, and held, that the property should remain in trust after the decease of testator.—*Cochran v. Lee's Admr.*, Ky., 84 S. W. Rep. 337.

158. WITNESSES—Evidence to Establish Contract of Decedent.—One from whom party derives his interest is disqualified from testifying in an action to enforce such interest against the decedent's estate, under Code Civ. Proc. § 829.—*Rosseau v. Rouss*, N. Y., 72 N. E. Rep. 916.

159. WITNESSES—Examination Before Trial.—An order for the examination of a party before trial cannot be obtained, unless it fairly appears from the moving papers that it is intended to use the evidence upon the trial.—*Whitney v. Rudd*, 91 N. Y. Supp. 429.

160. WITNESSES—Impeachment—Cross Examination.—A witness who testified to defendant's general reputation could not be asked on cross examination if he had not himself been impeached.—*Hellard v. Commonwealth*, Ky., 84 S. W. Rep. 329.

161. WORK AND LABOR—Express and Implied Contracts.—Where certain services were rendered under an express contract, the person receiving the same was not liable on an implied one.—*Grimm v. Barrington*, Mo., 84 S. W. Rep. 857.